

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GORDON SCOTT STROH,

Plaintiff,

v.

SATURNA CAPITAL CORPORATION;
NICHOLAS KAISER and DEBORAH KAISER,
husband and wife; and JANE CARTEN and
TERRANCE CARTEN, wife and husband,

Defendants.

No. 2:16-cv-00283

CONSOLIDATED MOTION TO
DISMISS CLAIMS AND STRIKE
ALLEGATIONS

Noted for hearing: May 27, 2016

Oral Argument Requested

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I. INTRODUCTION AND FACTUAL BACKGROUND

Scott Stroh was the Chief Legal Officer for Saturna Capital Corporation and the Chief Compliance Officer for Saturna Capital's affiliate, Saturna Brokerage Services (collectively, "Saturna"), among other roles, until he quit in July 2014. Complaint [Dkt. 5, Ex. A] at ¶ 8.¹

Although Stroh alleges that he was terminated, ¶ 8, his own contemporaneous statements (as referenced in his Complaint)² show that at 9:55 a.m. on July 15, 2014, the morning Stroh learned he would not receive a pay raise, Stroh texted his girlfriend and told her he was "coming home" because he "basically gave notice at my job." Declaration of Nara Neves ("Neves Decl."), Ex. A at 1. An hour later, he texted Saturna's compliance officer, a junior employee who had reported to Stroh, and advised, "you should walk into jane's office and *quit... I just did.*" *Id.* (sic) (emphasis added). When asked by his subordinate whether Stroh was serious, Stroh replied "Yup, that's why I'm not there . . . They did not meet my demand." *Id.*

That evening, Stroh emailed Carten. He told her, "I want to emphasize how much I have enjoyed my time at Saturna. . . . I love my job and the people I work with, and it truly makes me sad to move on. . . . I need to do what is best for my family. ***This is about cash flow***

¹ Unless otherwise indicated, all paragraph citations herein are in reference to the allegations in the Complaint.

² Stroh's Complaint references and relies on the fact that he and Saturna's President, Jane Carten, "exchanged emails" regarding Stroh's employment status, and admits he told others that he "quit." ¶¶ 12, 62, 69. These emails and statements – some made in text messages – are thus documents that Stroh has incorporated by reference into his Complaint, and which may be considered on this Motion to Dismiss. In this Circuit, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss. Such consideration does not convert the motion to dismiss into a motion for summary judgment." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (internal quotation marks omitted), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (same); *see also Abarquez v. Onewest Bank, FSB*, 2011 WL 1459458, at *1 (W.D. Wash. Apr. 15, 2011) (considering documents referenced in the complaint in order to "provide necessary context in this case.").

Defendants do not assert that these emails and text messages constitute the entire record on the issue of Stroh's resignation – there is much more to show the falsity of Stroh's claims, which will be presented in due course. Defendants are not moving to dismiss any claims based solely on the contents of these documents. Rather, for now Saturna presents only these few documents to correct the flagrantly inaccurate allegation that Stroh did not resign and as context to show his "Emotional Distress" claim should be dismissed. *See* Section II.C, below.

1 *and my ability to provide for them, nothing more...nothing less.*” Neves Decl., Ex. B. at 1
2 (emphasis added). He went on to demand a 30% salary increase as a condition of returning to
3 Saturna, and told Carten that he could “begin work tomorrow” at several other jobs. *Id.* He
4 closed by telling her that “if you are not willing or able to make that happen, I have no hard
5 feelings and am happy to work with you to manage the transition.” *Id.* Carten responded
6 within an hour, telling Stroh that, based on his previous statements to her, she had already hired
7 a legal recruiter to begin the process of replacing him. *Id.* at 3. She told him that his demands
8 were too high, and reminded him of the generous benefit package that he had been receiving.
9 *Id.*

10 Stroh’s follow-up email later that night recognized that his statements to Carten “came
11 across as a foregone conclusion that I was leaving.” *Id.* at 6. He reiterated that “I like what I
12 do” but restated his original demand for a salary increase. *Id.* Carten responded the next day
13 by improving her offer. *Id.* at 9. Stroh almost immediately rejected that olive branch, telling
14 her that the \$30,000 annual raise she had proposed would “just kick the can down the road
15 another year.” *Id.* at 10. He told her, “*I just can’t do it at what you are offering,*” and even
16 though he recognized that the salary difference was “a painfully small number to terminate
17 employment over,” he explained that “*my situation is pure math.*” *Id.* (emphasis added). He
18 then offered to “do the right thing and work the next couple weeks to help minimize the impact
19 of my departure,” and suggested that he could be useful in assisting Carten retain other legal
20 and compliance staffers (despite his suggestions to the contrary in his text messages to those
21 individuals). *Id.*

22 Carten accepted Stroh’s resignation, writing, “Sounds like I’m going to have to accept
23 your offer to stay on for a bit while we get something in place.” *Id.* at 12. The following
24 morning, Stroh met with Carten, and she accepted his resignation in person. Following that
25 meeting, Stroh attempted to reverse his decision to resign and unilaterally revive negotiations
26 by continuing to demand more money than Saturna was willing to offer, while restating that “I
27 harbor no ill-will towards you or Saturna and have very much enjoyed the past eight years.

1 Everything else from this point on is just business.” *Id.* at 18. Later that day, he followed that
 2 email with another in which he informed Carten that, “I enjoy working at Saturna . . . ***But for***
 3 ***my financial issues, I have no desire to leave.***” *Id.* at 19. Saturna did not want to pay – and
 4 was under no obligation to pay – what Stroh demanded, so Stroh’s resignation stood. ¶¶ 62, 64,
 5 69.

6 Stroh has since tried a different way to extract money from Saturna. He now accuses
 7 Saturna of various regulatory violations and claims the outcome of his “hard bargaining” was
 8 actually retaliation against him for purported internal whistleblowing. This allegation has no
 9 merit. Stroh is simply trying to leverage the fact that, in his former role as Saturna’s Chief
 10 Legal Officer and Chief Compliance Officer, he was privy to information about regulatory
 11 issues that anyone in such a position would have to address. Rather than adhering to his
 12 ongoing fiduciary obligations to Saturna, he is now seeking to exploit his former role in the
 13 hope that it supports his attempt to extract money from his former client.

14 The evidence showing that Stroh’s claims lack merit will be overwhelming as this case
 15 proceeds.³ At this stage, however, the truth of his baseless allegations has to be assumed.⁴
 16 Nevertheless, several of Stroh’s claims are subject to immediate dismissal because he fails to
 17 plead required elements and, by including irrelevant and inflammatory accusations based on
 18 confidential information he obtained during his tenure as Saturna’s attorney, Stroh violated his
 19 ethical duties under Washington’s Rules of Professional Conduct.⁵ Pursuant to Federal Rules

20 ³ Defendants intend to move for summary judgment after the completion of necessary discovery, and are confident
 21 that the entire lawsuit will be dismissed at that stage.

22 ⁴ Under Rule 12(b)(6), the facts alleged in the Complaint are presumed true for the purpose of this Motion only.
 23 Ordinarily, in a Motion to Dismiss, Defendants would describe the allegations in Stroh’s Complaint in order to
 24 provide the factual context for this Motion. However, to avoid filing this Motion under seal, Defendants have
 25 omitted references to allegations covered by Rule of Professional Conduct 1.6. The Complaint, which is
 26 provisionally under seal, describes Stroh’s version of events in paragraphs 59-62. Pursuant to this Court’s Order,
 27 Defendants will file their Memorandum in support of the Motion to Seal the Unredacted Complaint by May 6,
 2016.

⁵ As will be shown during the course of this lawsuit, Stroh also breached his duties to Saturna by disclosing
 information covered by Rule 1.6 of the Washington Rules of Professional Conduct in the submission he made to
 the Department of Labor under section 806 of the Sarbanes-Oxley Act without any consent from his former client.

1 of Civil Procedure 12(b)(1), 12(b)(6) and 12(f), Defendants move to dismiss or strike the
2 following sections of the complaint:

3 **First**, Stroh's First Cause of Action, alleging violations of the whistleblower protection
4 provisions of the Sarbanes-Oxley Act ("SOX"), should be dismissed as to defendants Nick
5 Kaiser and Jane Carten because Stroh failed to administratively exhaust those claims, thereby
6 depriving this Court of jurisdiction over them.

7 **Second**, Stroh's Second Cause of Action, alleging violations of the whistleblower
8 protection provisions of the Dodd-Frank Act, fails to state a claim because Stroh does not
9 qualify as a "whistleblower" under that statute, which clearly defines the term "whistleblower
10 only as someone who reported the allegations to the Securities and Exchange Commission
11 ("SEC").

12 **Third**, Stroh's Fourth Cause of Action for intentional infliction of emotional distress
13 should be dismissed because Stroh does not allege that he suffered extreme and outrageous
14 conduct and cannot as a matter of law allege that he actually suffered extreme emotional
15 distress given his willingness to continue working at Saturna for a salary increase.

16 **Fourth**, Stroh's Sixth Cause of Action, alleging that Saturna breached promises to Stroh
17 in its Code of Ethics, should be dismissed because the Code of Ethics created no such promises.

18 **Fifth**, the Court should strike all of the factual allegations that do not relate to the
19 alleged violations of the securities laws or alleged retaliatory actions by Defendants relating to
20 Stroh's efforts to comply with those laws, as they cannot support Stroh's claims under SOX or
21 state law. Stroh's inclusion of such allegations reveal more than the minimum amount of
22 confidential information necessary to bring his claims and thus violate his ongoing duty to
23 Saturna under RPC 1.6.

24 **Sixth**, all claims against Deborah Kaiser and Terence Carten should be dismissed as the
25 Complaint does not allege either of them took any relevant actions and appears to name them
26
27

only in an unnecessary attempt to bind Mr. Kaiser and Ms. Carten's respective marital communities.⁶

II. ARGUMENT

A. Stroh Failed to Exhaust His Administrative Remedies Against Kaiser and Carten and their Spouses.

SOX only permits whistleblower retaliation allegations to be filed in federal court if plaintiff has filed a complaint with the Department of Labor and that complaint has not been resolved within 180 days. 18 U.S.C. § 1514A(b)(1)(B). "A federal district court does not have jurisdiction over a SOX whistleblower claim unless the plaintiff follows these administrative procedures." *Nieman v. Nationwide Mut. Ins. Co.*, 706 F. Supp. 2d 897, 907 (C.D. Ill. 2010); *see also JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 705, 710 (E.D. Va. 2007) (SOX "exhaustion requirement is jurisdictional"); *Mart v. Forest River, Inc.*, 854 F. Supp. 2d 577, 599 (N.D. Ind. 2012) (citing multiple district court cases for the same proposition).

While Stroh filed a complaint with the DOL, *see* ¶¶ 70-71, that complaint named only one respondent: Saturna. The DOL Complaint alleges that "Saturna employed discrimination, blacklisting, and adverse changes to the terms and conditions of Mr. Stroh's employment," that he was terminated, and that "Saturna failed to re-hire Mr. Stroh." Neves Decl., Ex. C ("DOL Complaint") at 7.⁷ While the DOL Complaint lists Kaiser and Carten as a "management

⁶ References to Kaiser or Carten in this Motion refer to Nicholas Kaiser, Saturna's Chairman, and Jane Carten, Saturna's President.

⁷ The Court may consider Stroh's DOL Complaint on this motion to dismiss. First, Stroh's Complaint in this court alleged the existence of his DOL Complaint, *see* ¶¶ 70-71, and the contents of that Complaint are not in dispute. *See* footnote 2, above.

Second, Saturna is moving to dismiss Stroh's SOX claim against Kaiser and Carten for lack of jurisdiction under Rule 12(b)(1). Under this Rule, where a defendant makes a "factual attack" by "disput[ing] the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction," "the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment" and "need not presume the truthfulness of the plaintiff's allegations." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.* (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)).

1 person” and “supervisor,” respectively, and alleges they were the individual actors who were
 2 responsible for the retaliation he claims to have suffered, it does not specifically request that
 3 OSHA (the agency within DOL responsible for investigating SOX complaints) treat them as
 4 individual respondents to the DOL Complaint.

5 This is not sufficient to exhaust Stroh’s claims against Kaiser and Carten as individuals.
 6 “While the regulations implementing SOX may provide for individual liability, [a plaintiff] still
 7 is obligated to exhaust her administrative remedies for *each claim* that she seeks to assert
 8 against *each defendant*.” *Bridges v. McDonald’s Corp.*, 2009 WL 5126962, at *3 (N.D. Ill.
 9 Dec. 21, 2009) (citing multiple cases for the same proposition) (emphasis added). Exhaustion
 10 requires naming each individual as a respondent to the DOL complaint: “merely mentioning an
 11 individual defendant in the body of the administrative complaint as an actor, rather than naming
 12 him (or her) in the caption of the administrative complaint, fails to afford OSHA the
 13 opportunity to resolve a plaintiff’s allegations through the administrative process.” *Id.*

14 This is not a mere formality. “OSHA is a United States administrative agency
 15 responsible for analyzing a large volume of workplace complaints. OSHA is not charged with
 16 the task of deducing from a complaint every possible respondent. To a large extent, the OSHA
 17 complainant frames the OSHA investigation by naming certain respondents.” *Genberg v.*
 18 *Porter*, 935 F. Supp. 2d 1094, 1104 (D. Colo. 2013) *aff’d in part, appeal dismissed in part*, 566
 19 Fed. Appx. 719 (10th Cir. 2014) (granting motion to dismiss for failure to exhaust claims
 20 against individual defendants). This is true even where a complaint “rather extensively” names
 21 individuals within the body of the complaint; unless a defendant is “listed as a ‘named’
 22 respondent who is alleged to have violated” SOX, the administrative complaint cannot provide
 23 sufficient notice to either the individual or OSHA to satisfy the exhaustion requirement.
 24 *Lutzeier v. Citigroup, Inc.*, 2015 WL 1033696, at *2 (E.D. Mo. Mar. 9, 2015) (Lutzier II).

25 OSHA’s regulations and its actions in this matter support the conclusion that Stroh’s
 26 DOL Complaint failed to exhaust his claims against Kaiser and Carten. OSHA’s regulations
 27 define “Respondent” as “the person named in the complaint who is alleged to have violated the

Act.” 29 C.F.R. § 1980.101(k). Stroh’s DOL Complaint does not allege that Kaiser or Carten specifically took any acts or violated any laws; rather, he claims that *Saturna* was responsible for each adverse employment action that he suffered. DOL Complaint at 7-8. OSHA’s handling of its investigation confirms that it did not view Kaiser or Carten as respondents. In fact, its final Report of Investigation (“ROI”) lists only one “Respondent” in this matter: Saturna. Neves Decl., Ex. D.⁸ In addition, OSHA regulations require the agency to “notify the respondent” of any complaint. 29 C.F.R. § 1980.104(a). Pursuant to this rule, OSHA notified Saturna (both directly and through counsel) of Stroh’s complaint. Neves Decl., Ex. E. OSHA never provided such notification to Kaiser or Carten. Declaration of Nicholas Kaiser at ¶ 2-3; Declaration of Jane Carten at ¶ 2-3. OSHA’s ROI and its failure to contact Kaiser or Carten show that the agency did not consider them to be respondents to Stroh’s DOL Complaint.

“It is undisputed that [SOX] requires a plaintiff to exhaust his administrative remedies before commencing an action in federal court. It is also clear that . . . a plaintiff may not sue a particular defendant in federal court . . . unless he has exhausted his administrative remedies as to that defendant.” *Smith v. Corning Inc.*, 2007 WL 2120375, at *2 (W.D.N.Y. July 23, 2007). Stroh did not do so with respect to Kaiser and Carten, and his SOX claim against them must be dismissed under Rule 12(b)(1) for lack of jurisdiction.⁹

B. Stroh Is Not A Whistleblower Under the Dodd-Frank Act.

The Dodd-Frank Act prohibits retaliation against “whistleblowers.” 15 U.S.C. § 78u-6(h)(1)(A). The Act defines “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws *to the [Securities and Exchange] Commission.*” *Id.* § 78u-6(a)(6) (emphasis added). Congress provided that this definition of the term

⁸ This Court may consider facts outside the Complaint on this motion to dismiss for lack of jurisdiction under Rule 12(b)(1), including the documents attached to the Declaration of Nara Neves as well as the Declarations of Nicholas Kaiser and Jane Carten. See footnote 7, above; *Safe Air for Everyone*, 373 F.3d at 1039.

⁹ Stroh’s DOL Complaint does not contain any mention of Deborah Kaiser or Terence Carten. Thus, in addition to the argument set forth in Part II.F below, Stroh’s SOX claim against Ms. Kaiser and Mr. Carten must be dismissed for lack of jurisdiction as he failed to exhaust his administrative remedies as to them.

1 whistleblower “shall apply” to the entire statute, which includes the anti-retaliation subsection.
 2 *Id.* at § 78u-6(a).

3 Interpreting these statutory provisions, the Fifth Circuit recently held that “the
 4 whistleblower-protection provision [of Dodd-Frank] unambiguously requires individuals to
 5 provide information relating to a violation of the securities laws *to the SEC* to qualify for
 6 protection from retaliation.” *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629 (5th Cir.
 7 2013). In *Asadi*, a former employee alleged that GE violated Dodd-Frank by firing him
 8 following his internal reports to his supervisor concerning possible FCPA violations. *Id.* at
 9 621. GE moved to dismiss Asadi’s complaint because he had not reported the alleged
 10 violations to the SEC. *Id.* at 621, 624-26. Finding the statute’s provisions unambiguous, the
 11 Court of Appeals acknowledged its duty to “give effect, if possible, to every word and every
 12 provision Congress used,” not “to rewrite language enacted by the legislature,” and to interpret
 13 provisions of the statute “in a manner that renders them compatible, not contradictory.” *Id.* at
 14 622. Applying these principles, the Fifth Circuit concluded that “[u]nder Dodd-Frank’s plain
 15 language and structure, there is only one category of whistleblowers: individuals who provide
 16 information relating to a securities law violation to the SEC.” *Id.* at 625. In reaching this
 17 conclusion, the Court took note of the signal purpose of Section 922 of Dodd-Frank—to
 18 “encourage[] individuals to provide information relating to a violation of U.S. securities laws to
 19 the Securities and Exchange Commission.” *Id.* at 622-23.

20 This interpretation has been adopted by numerous district courts around the country,
 21 including several in this Circuit. The Northern District of California considered this issue in
 22 *Banko v. Apple Inc.*, and determined that “[b]ecause plaintiff did not file a complaint to the
 23 SEC, he is not a ‘whistleblower’ under the Dodd-Frank Act.” 20 F. Supp. 3d 749, 757 (N.D.
 24 Cal. 2013) (dismissing Dodd-Frank retaliation claim). In analyzing the question, the court
 25 reasoned that “[t]o conclude to the contrary, one would have to ignore several canons of
 26 statutory interpretation,” by “ignor[ing] the plain language of th[e] statute,” “violat[ing] the
 27 surplusage canon that every word is to be given effect” through effectively writing the

1 definitional clause out of the statute, “contradict[ing] th[e] section’s title,” and improperly
 2 permitting an executive agency to create ambiguity by regulation where no such ambiguity
 3 exists on the face of the statute. *Id.* at 756-57. *See also Davies v. Broadcom Corp.*, 130 F.
 4 Supp. 3d 1343 (C.D. Cal. 2015) (dismissing Dodd-Frank retaliation claim where plaintiff did
 5 not report to the SEC because “the Court trusts that when Congress explicitly defines a term in
 6 a statute, it intends that definition to govern the use of the term.”).¹⁰

7 As was the case in *Asadi*, *Banko*, and *Davies*, Stroh does not allege that he reported any
 8 information to the SEC before his employment ended. *See* Complaint at ¶¶ 74-76. Thus, he
 9 too is not a Dodd-Frank “whistleblower,” and his claim should be dismissed for the same
 10 reasons.

11 Certain other courts and the SEC have urged an alternate reading of the statute, which is
 12 flawed for several reasons. In 2011, the SEC promulgated Exchange Act Rule 21F-2, which
 13 states that, for the limited purpose of the Dodd-Frank retaliation provisions, the term
 14 “whistleblower” includes employees who report internally, notwithstanding the statutory
 15 language that limits that term to those who provide information to the SEC. 17 C.F.R.
 16 § 240.21F-2(b)(ii). In *Berman v. Neo@Ogilvy LLC*, the Second Circuit observed that
 17 applying the definition of whistleblower as drafted by Congress to the whistleblower protection
 18 section would give that portion of the Act an “extremely limited scope.” 801 F.3d 145, 150-51
 19 (2d Cir. 2015). Against that backdrop, the *Berman* court decided that “sufficient ambiguity
 20 exists in Dodd-Frank to warrant deference to the SEC’s Rule.” *Id.* at 154. Applying
 21 *Chevron USA Inc. v. N.R.D.C.*, 467 US 837 (1984), it determined that the SEC was the
 22 appropriate agency to resolve the ambiguity it had discovered and that Rule 21-F was a
 23

24 _____
 25 ¹⁰ Other district court decisions taking the same position include *Lutzeier v. Citigroup Inc.*, 305 F.R.D. 107, 110
 26 (E.D. Mo. 2015) (Lutzier I), *order vacated in part on reconsideration*, 2015 WL 7306443 (E.D. Mo. Nov. 19,
 27 2015); *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 646 (E.D. Wis. 2014); *Verble v. Morgan Stanley
 Smith Barney, LLC*, 2015 WL 8328561, at *4-10 (E.D. Tenn. Dec. 8, 2015), *appeal filed*, No. 15-6397 (6th Cir.
 Dec. 17, 2015); *Englehart v. Career Educ. Corp.*, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014).

reasonable interpretation of the statutory language, and thus held that the plaintiff was entitled to pursue a claim under Dodd-Frank despite his failure to report to the SEC. *Id.* at 155.¹¹

This reading is not persuasive. As the Fifth Circuit explained,

If Congress had selected the terms “individual” or “employee,” [a finding of ambiguity] would follow more naturally because the use of such broader terms would indicate that Congress intended any individual or employee—not just those individuals or employees who qualify as a “whistleblower”—to be protected from retaliatory actions by their employers. Congress, however, used the term “whistleblower” throughout subsection (h) and, therefore, [the Court] must give that language effect.

Asadi, 720 F.3d at 626–27.

In fact, the legislative history of the Dodd-Frank Act shows that Congress did more than simply choose a limited definition; it affirmatively rejected the broader terms. The anti-retaliation provision in the bill originally passed by the House did not use the term “whistleblower” but instead broadly prohibited adverse employment actions against “an employee, contractor, or agent in the terms and conditions of employment.” H.R. 4173, 111th Cong. § 7203(g)(1)(A) (1st Sess. 2009). The Senate’s version replaced the phrase “employee, contractor, or agent” with the term “whistleblower,” defined as “any individual . . . who provides information relating to a violation of the securities laws *to the Commission*.” H.R. 4173, 111th Cong. §§ 922(a)(6), (h)(1)(A) (pp. 983-84) (2d Sess. 2010) (emphasis added). “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). Reading the statute the way that the SEC and Second Circuit suggest would require this Court to conclude that the Senate’s edits to the statute were intended to have no effect.

¹¹ Other district courts adopting this position include *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014), *aff’d on other grounds*, 773 F.3d 488 (3rd Cir. 2014); *Bussing v. CorClearing LLC*, 20 F. Supp. 3d 719, 729 (D. Neb. 2014); *Connolly v. Remkes*, 2014 WL 5473144, at *6 (N.D. Cal. Oct. 28, 2014); *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1094-95 (N.D. Cal. 2015).

1 Nor may the mere existence of an administrative interpretation create ambiguity where
 2 the plain language of a statute does not provide it. Regardless of the merits of the policy
 3 argument described above, “[w]here the statutory language is clear and unambiguous, we need
 4 neither accept nor reject a particular “plausible” explanation for why Congress would have
 5 written a statute.” *Barnhart v. Sigmon Coal Co.*, 534 US 438, 460 (2002). Rather, the
 6 appropriate analysis is simpler: “[w]e have stated time and again that courts must presume that
 7 a legislature says in a statute what it means and means in a statute what it says there. When the
 8 words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is
 9 complete.’” *Id.* at 461-62 (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254
 10 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))). Thus, “[i]n the context of
 11 an unambiguous statute, we need not contemplate deferring to the agency’s interpretation.” *Id.*
 12 at 462. Rule 21-F cannot expand the scope of the statutory language and transform Stroh into a
 13 Dodd-Frank “whistleblower” when he is not. *See also Negrete-Ramirez v. Holder*, 741 F.3d
 14 1047, 1054 (9th Cir. 2014) (declining to “alter the text [of the Immigration and Naturalization
 15 Act] in order to satisfy the policy preferences of the [BIA].”).

16 Although Stroh or the SEC may have preferred a more expansive statute, this Court
 17 must apply the one that Congress passed. The plain and unambiguous language of 15 U.S.C.
 18 § 78u-6(a)(6) limits the Dodd-Frank Act’s whistleblower protections exclusively to “any
 19 individual who provides . . . information relating to a violation of the securities laws to the
 20 [SEC].” *Id.* § 78u-6(a)(6). Stroh does not allege that he did so before the alleged retaliation.
 21 His Dodd-Frank cause of action thus fails to state a claim, as he is not a “whistleblower” for the
 22 purposes of that Act, and it must be dismissed under Rule 12(b)(6).¹²

23
 24
 25
 26 ¹² Defendants are aware that a similar issue was raised by Defendant’s Motion to Dismiss in *Feltoon v. MG2*
 27 *Corp.*, Case No. 2:15-02032 (RAJ) (W.D. Wash.). That Motion is currently pending before Judge Jones.

C. Stroh Does Not and Cannot Allege Extreme and Outrageous Conduct or Severe Emotional Distress.

In order to state a claim for intentional infliction of emotion distress, also known as the tort of outrage, Stroh must establish the following elements: “(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to plaintiff of severe emotional distress.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003); *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 261, 928 P.2d 1127 (1997). Stroh’s complaint fails to allege either that Defendants’ conduct was “extreme and outrageous” or that he suffered “severe emotional distress” and his claim must therefore be dismissed.

Extreme and outrageous conduct is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Kloepfel*, 149 Wn.2d at 196 (internal quotation marks omitted); *Dombrosky*, 84 Wn. App. at 261. “[T]he recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim ‘Outrageous!’” *Kloepfel*, 149 Wn.2d at 196 (internal quotation marks omitted). The tort does not encompass “insults, indignities, threats, annoyances, petty oppressions, or other trivialities,” and a plaintiff “must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.” *Id.* (internal quotation marks omitted). Although determination of whether certain conduct reaches the requisite level of outrageousness typically raises questions of fact, the Court “may dismiss a claim if reasonable minds could not differ as to the conclusion that the alleged behavior was not sufficiently extreme.” *Minvielle v. Smile Seattle Invs., LLC*, 2008 WL 4962694, at *5 (W.D. Wash. Nov. 19, 2008) (Zilly, J.) (citing *Dombrosky*, 84 Wn. App. at 261-2) (dismissing intentional infliction of emotional distress claim).

1 Stroh's claim rests on allegations that Defendants rejected or scornfully responded to
 2 his legal and compliance advice. See ¶¶ 10, 29, 33, 36, 38, 51, 53, 55.¹³ Washington case law
 3 is clear that this type of alleged conduct, even if found to have occurred by the finder of fact,
 4 does not support an intentional infliction of emotional distress claim.

5 In *Strong v. Terrell*, 147 Wn. App. 376, 381, 195 P.3d 977 (2008), a former employee
 6 brought an intentional infliction of emotional distress claim, alleging that her former supervisor
 7 regularly screamed at her, sarcastically criticized her work and ridiculed her personal life over
 8 the course of two years, causing plaintiff to vomit and suffer anxiety attacks, depression, and
 9 heart palpitations. The Court of Appeals held that this conduct was not sufficient to establish
 10 the tort of outrage. Although it expressed sympathy for some of the allegations, the court held
 11 that the conduct, at worst, fell into the unprotected category of insults, indignities, threats, and
 12 annoyances. *Id.* at 386. Likewise, in *Snyder v. Medical Service Corporation of Eastern*
 13 *Washington*, 98 Wn. App. 315, 319, 321-22, 988 P.2d 1023 (1999), *aff'd*, 145 Wn.2d 233, 35
 14 P.3d 1158 (2001), the Court of Appeals determined that a supervisor's conduct in insulting and
 15 threatening her employee did not support a claim for intentional infliction of emotional distress.
 16 Similarly, summary termination of an employee by a supervisor who directed derogatory
 17 language at female employees also did not amount to extreme and outrageous conduct. *Imeson*
 18 *v. Eagle View Techs., Inc.*, 2014 WL 1047165, at *6 (W.D. Wash. Mar. 14, 2014).

19 Even assuming Stroh's allegations to be true, Defendants' conduct is less severe than
 20 the insults, indignities and threats at issue in these cases that did not rise to the requisite level of
 21 outrageousness. No reasonable person could conclude that any harassment or retaliation
 22 alleged by Stroh was "so outrageous in character, and so extreme in degree, as to go beyond all
 23

24 ¹³ Generally, Defendants would characterize these allegations. However, the allegations in these paragraphs
 25 contain confidential information under RPC 1.6. The Court has access to the content of these allegations in the
 26 sealed Complaint. In the interest of limiting the number of documents filed under seal in this matter, Defendants
 27 have omitted the content of these paragraphs from this Motion; however, to the extent that Stroh believes that
 more detail is required in order to respond to this Motion, Defendants do not agree that he may do so in a publicly-
 filed document. See footnote 2, above.

possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Kloepfel*, 149 Wn.2d at 196. Accordingly, Stroh has failed to state a claim for the tort of outrage. *See Johnston v. M/V Dieu Si Bon*, 1996 WL 866112, at *2 (W.D. Wash., Oct. 10, 1996) (granting Rule 12(b)(6) motion with respect to intentional infliction of emotional distress claim based on allegations of employer mistreatment).

In addition to Stroh’s failure to plead extreme and outrageous conduct, there are no factual allegations to support a finding that Stroh actually suffered severe emotional distress. The term “emotional distress” encompasses “all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 871-72, 324 P.3d 763 (2014) (internal quotation marks omitted). There is only liability, however, when the emotional distress is extreme. *Id.* at 872 (internal citations omitted). There must be more than “transient and trivial emotional distress.” *Id.* (internal quotations omitted). Although the Complaint claims that Stroh “suffered emotional distress” as a result of Defendants’ outrageous conduct, (¶ 82), it does not say that his mental reaction was severe and there are no allegations to support an inference that this was the case.¹⁴ Stroh alleges no facts supporting the notion that his feelings following his alleged termination resulted in severe distress with long-term impact. Accordingly, the claim must also be dismissed for failure to plead actual result to Stroh of severe emotional distress.

D. Stroh Fails to State a Claim for Breach of Securities Industry Ethical Duties.

Stroh asserts a claim for “breach of securities industry ethical duties” on the ground that Saturna’s Code of Conduct, which is required under SEC Rule 204A-1, established a duty to Stroh to observe industry and entity standards. ¶¶ 87-88. This claim fails because there is no

¹⁴ In fact, Stroh’s contemporaneous emails say the opposite. *See, e.g.*, Neves Decl., Ex. B at 1 (“I love my job and the people I work with.”); 2 (“Please accept my sincerest thanks for the past eight years.”); 6 (“I very much enjoy my job”); 6 (“I don’t need that kind of money to stay at Saturna”); 10 (“I’d like to really lay down roots and stay with Saturna”).

1 actionable statement in Saturna's Code of Ethics (which Stroh refers to as the Code of
2 Conduct) promising specific treatment of Saturna employees in specific situations.

3 SEC Rule 204A-1 requires registered investment advisers to maintain a code of ethics
4 that governs the conduct of individuals under the adviser's supervision who make securities
5 recommendations to clients or who have access to nonpublic information regarding the
6 purchase or sale of securities or the portfolio holdings of any reportable funds ("supervised
7 persons"). 17 C.F.R. § 275.204A-1(a), (e)(1). The code of ethics must set forth a standard of
8 business conduct required of supervised persons that reflects the fiduciary obligations of the
9 advisers and its supervised persons, as well as provisions requiring supervised persons (1) to
10 comply with federal securities laws; (2) to report personal securities holdings and transactions;
11 (3) to obtain approval before acquiring beneficial ownership in any security in an initial public
12 offering or limited offering; (4) to report violations of the code of ethics; and (5) to
13 acknowledge in writing receipt of the code of ethics and any amendments. 17 C.F.R.
14 § 275.204A-1(a)-(c).

15 Pursuant to these regulations, Saturna maintains a Code of Ethics governing the
16 personal securities transactions and business activities of individuals under its control who have
17 access to information regarding security transactions by Saturna clients or who make
18 recommendations regarding such transactions. Neves Decl., Ex. F (Saturna Capital Code of
19 Ethics).¹⁵ The preamble to the Code of Ethics states that "[a]ll persons must comply with
20 applicable federal and state securities laws, as well as the rules of applicable self-regulatory
21 organizations such as the Financial Industry Regulatory Authority." *Id.* Individuals are
22 directed to report violations of the Code of Ethics to the Chief Compliance Officer. *Id.* Stroh
23 claims these provisions "created an atmosphere of job security and fair treatment with promises
24 of management's appreciation of efforts to ensure compliance with securities regulations and
25

26 ¹⁵ The Court may consider Saturna's Code of Ethics on this Motion to Dismiss because the document is referenced
27 in paragraph 87 of the Complaint and its contents are not in dispute. *See* footnote 2, above.

1 corporate duties,” and that Saturna breached these promises by taking action against him
2 because of his efforts to comply with securities regulations. ¶¶ 87-88.

3 Employment contracts that are indefinite as to duration are generally terminable at will
4 by either the employer or employee. *Roberts v. Atl. Richfield Co.*, 88 Wn.2d 887, 894, 568
5 P.2d 764 (1977). However, written employment policies or procedures “may create an
6 atmosphere of job security and fair treatment with promises of specific treatment in specific
7 situations, whereby an employee is induced to remain on the job and not actively seek other
8 employment.” *Quedado v. Boeing Co.*, 168 Wn. App. 363, 369, 276 P.3d 365 (2012). In order
9 to establish this type of equitable reliance claim, the employee must prove “(1) that a statement
10 (or statements) in an employee manual or handbook or similar document amounts to a promise
11 of specific treatment in specific situations, (2) that the employee justifiably relied on the
12 promise, and (3) that the promise was breached.” *Id.* (quoting *Bulman v. Safeway, Inc.*, 144
13 Wn.2d 335, 340-41, 27 P.3d 1172 (2001)). “[G]eneral statements of company policy” cannot
14 sustain an equitable claim of reliance on a specific promise. *Id.* “Only those statements in
15 employment manuals that constitute promises of specific treatment in specific situations are
16 binding.” *Id.* (quoting *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613, 762 P.2d 1143
17 (1988)). Whether an employer has made a promise specific enough to justify equitable reliance
18 is typically a question of fact, but “if reasonable minds cannot differ as to whether language
19 sufficiently constitutes an offer or a promise of specific treatment in specific circumstances, as
20 a matter of law the claimed promise cannot be part of the employment relationship.” *Id.*
21 (quoting *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522, 826 P.2d 664 (1992)).

22 As a preliminary matter, Stroh fails to identify a statement in Saturna’s Code of Ethics
23 that amounts to a commitment of specific treatment in specific situations. This is not
24 surprising, however, as the Code makes no promises to Stroh or other employees of specific
25 treatment in situations where they report potential violations of securities regulations on the
26 part of the company. *See* Neves Decl., Ex. F (Saturna Capital Code of Ethics). The Code of
27 Ethic’s reporting requirement is limited to violations of the Code itself, which overwhelmingly

concerns the private investment activities of individuals with knowledge of the securities transactions of Saturna's clients. *See id.* at p. 12. Stroh does not allege that he reported potential violations of the Code of Ethics. Further, to the extent the Code's reporting requirement extends beyond the private investment and business activities of Saturna employees to violations of federal or state securities laws, the Code still makes no promises of specific treatment to the individuals making the report. *See Quedado*, 168 Wn. App. at 370 (employer Code of Conduct that made no specific promises as to how employees would be treated in specific circumstances did not provide basis for equitable reliance claim). Absent any promises of specific treatment to Stroh under the circumstances alleged, his claim necessarily fails as a matter of law.

E. Stroh's Irrelevant and Inflammatory Accusations Should Be Stricken From the Complaint.

Defendants move to strike paragraphs 13-15, 18-24 and 36-39 of the Complaint on the ground that they violate Stroh's duty of confidentiality to Saturna as its former counsel under the Washington Rules of Professional Conduct ("RPC"). *See* RPC 1.6 Cmt. 18 ("The duty of confidentiality continues after the client-lawyer relationship has terminated."). The Court may strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Allegations are immaterial where they have "no essential or important relationship to the claim for relief or the defenses being pleaded." *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*, 258 F.R.D. 663, 665 (W.D. Wash. 2009) (internal quotation marks omitted). "Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* (internal quotation marks omitted). Although motions to strike are generally disfavored, and the pleading is viewed in the light most favorable to the pleading party, motions to strike are warranted where the challenged pleading "has no logical connection to the controversy at issue and may prejudice one or more parties." *Johnson v. U.S. Bancorp*, 2012 WL 6615507, at *7 (W.D. Wash. Dec. 18, 2002).

1 This case presents the rare circumstance in which striking matter from Stroh's
 2 complaint is justified because Saturna has been and will continue to be prejudiced by Stroh's
 3 failure to comply with his ongoing ethical obligations as former counsel for Saturna and his
 4 corresponding breach of fiduciary duty to it.¹⁶ *See Coudriet v. Int'l Longshore and Warehouse*
 5 *Union Local 23*, 2008 WL 2262322 (W.D. Wash. May 29, 2008) (granting motion to strike
 6 allegations concerning privileged attorney-client communications that were highly prejudicial
 7 to defendant). RPC 1.6(a) states that "[a] lawyer shall not reveal information relating to the
 8 representation of a client unless the client gives informed consent, the disclosure is impliedly
 9 authorized in order to carry out the representation or the disclosure is permitted" under an
 10 exception to this rule. Stroh admits that the overwhelming majority of his allegations relate to
 11 his representation of the Saturna entities, *see* Complaint ¶ 8, and Saturna has not consented to
 12 this disclosure. Nevertheless, Stroh contends that his claims do not violate RPC 1.6(a) given
 13 the exception set forth in RPC 1.6(b)(5), which allows the lawyer, to the extent he reasonably
 14 believes necessary, to "reveal information relating to the representation of a client to establish a
 15 claim or defense on behalf of the lawyer in a controversy between the lawyer and client."
 16 However, the comments to this rule are clear that "a disclosure adverse to the client's interest
 17 should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."
 18 RPC 1.6, Cmt. 14. Further, the exceptions to the general rule of confidentiality "should not be
 19 carelessly invoked." RPC 1.6, Cmt. 24 (quoting *In re Boelter*, 139 Wn. 2d 81, 91, 985 P.2d
 20 328 (1999)).

21 In this case, Stroh's claims depend upon his establishing that Defendants retaliated
 22 against him as a result of Stroh's efforts to comply with securities regulations. Stroh's SOX
 23

24 ¹⁶ The Rules of Professional Conduct may support a finding of breach of fiduciary duty claim under Washington
 25 law. *See Rafel Law Group PLLC v. Defoor*, 176 Wn. App. 210, 226, 308 P.3d 767 (2013) ("Violation of the Rules
 26 of Professional Conduct may not be used as evidence of legal malpractices ... A trial court can, however, consider
 27 the RPCs when determining whether an attorney breached his or her fiduciary duty to a client"); *see also Kidwell*
v. Sybaritic, Inc., 784 N.W.2d 220, 232-33 (Minn. 2010) (Magnuson, J. concurring) (in-house counsel breached
 fiduciary duty in overextending narrow exception to duty of confidentiality under Rules of Professional Conduct).

claim requires him to prove that he was retaliated against as a result of “protected activity,” which is defined as reporting violations of the securities laws. *See* Complaint ¶¶ 67-68. Similarly, his wrongful discharge claim requires a finding that Defendant’s actions violated public policy and Stroh’s Complaint identifies only one such public policy that he claims was violated: “adher[ing] to federal and Washington state securities laws.” *Id.* ¶ 78. The allegations contained in paragraphs 13-15, 18-24, and 36-39 of the Complaint are impertinent and immaterial because they do not pertain to alleged securities violations or retaliatory actions against Stroh as a result of his reports of those purported violations, and thus bear no essential relationship to Stroh’s claims. *Campagnolo*, 258 F.R.D. at 665. They are also scandalous in overstepping the bounds of RPC 1.6 because they characterize confidential information that is not reasonably necessary to support Stroh’s claims. Although Stroh has filed the Complaint under seal, he still must “make every effort practicable to avoid unnecessary disclosure of information” relating to his representation of Saturna. RPC 1.6, Cmt. 23. At the very least, that must include omitting matter that is not necessary to support his claims. For the foregoing reasons, Defendants request that paragraphs 13-15, 18-24, and 36-39 be stricken from the Complaint.

F. Deborah Kaiser and Terence Carten Should Be Dismissed As Defendants.

The Complaint names Deborah Kaiser and Terence¹⁷ Carten as Defendants in their spousal capacity, and asserts each cause of action against them. ¶¶ 65-88 (causes of action made “Against All Defendants”). However, neither Ms. Kaiser nor Mr. Carten can be found in any of the Complaint’s factual allegations. Although Ms. Kaiser and Mr. Carten are individually named, it appears that they are included not in an attempt to find them personally liable, but in an effort to bind Mr. Kaiser and Ms. Carten’s respective marital communities. This is unnecessary and serves no legitimate purpose. The court should permit Ms. Kaiser and Mr. Carten to remove their names from this litigation.

¹⁷ The caption misspells Mr. Carten’s first name; this Motion will use the correct spelling.

Under analogous California law,

where a non-debtor spouse is named solely as a community representative, in order to bind the community for acts committed by the debtor spouse during the marriage, and not in an effort to reach the non-debtor spouse's separate property, the non-debtor spouse may opt not to participate in the litigation, and will be dismissed as essentially a nominal defendant upon the non-debtor spouses' request.

Reynolds & Reynolds Co. v. Universal Forms, Labels & Sys., Inc., 965 F. Supp. 1392, 1397 (C.D. Cal. 1997). This principle is based on the fact that in a community property state, the community estate is liable for debts "regardless of whether one or both spouses are parties . . . to a judgment." California Family Code § 910. Because the non-debtor spouse "has no personal liability [and] that spouse's separate property cannot be reached . . . there appears to be no legitimate advantage to plaintiff in forcing the unwilling spouse to participate in the litigation." *Reynolds*, 965 F. Supp. at 1397; *see also 11601 Wilshire Assocs. v. Grebow*, 64 Cal. App. 4th 453, 457, 74 Cal. Rptr. 2d 912 (1998) (same); *Santa Fe Pointe, LP v. Greystone Servicing Corp., Inc.*, 2009 WL 32525, at *1 (N.D. Cal. Jan. 5, 2009) (same).

Washington law contains the same principles, and the result should be the same here. Like California, Washington is a community property state. RCW 26.16.030. Like California, in Washington it is not necessary to sue both spouses in order to obtain a recovery against that community estate: "If the spouses or the domestic partners are sued together, either or both spouses or either or both domestic partners may defend." RCW 4.08.040. And like California, community debts may not be enforced against a spouse's separate property solely because of the fact of a marriage. RCW 26.16.190. Therefore, because Stroh has no independent claim against Ms. Kaiser or Mr. Carten and because they are not needed to defend the suit against their spouses, all claims against them should be dismissed.

III. CONCLUSION

For all of the reasons set forth above, Stroh's SOX claim against Kaiser and Carten (and their spouses) should be dismissed for lack of jurisdiction under Rule 12(b)(1); his Dodd-Frank, Emotional Distress, and Ethical Duties claims should be dismissed under Rule 12(b)(6); all

1 claims against Deborah Kaiser and Terence Carten should be dismissed under Rule 12(b)(6);
2 and paragraphs 13-15, 18-24 and 36-39 should be stricken from the Complaint under Rule
3 12(f).

4
5 DATED this 26th day of April, 2016.

6 Davis Wright Tremaine LLP
7 Attorneys for Defendants

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PROOF OF SERVICE

I hereby certify that on April 26, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Christopher Brian Wells wellsc@lanepowell.com, docketing-sea@lanepowell.com,
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and I hereby certify that a copy was mailed by United States Postal Service to the following non-CM/ECF participants.

N/A

DATED this 26th day of April, 2016.

/s/ Jeffrey B. Coopersmith
Jeffrey B. Coopersmith